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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 341. 40

HENRY M. RECTOR, APPELLANT,

vs.

MATILDA LIPSCOMB.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

FILED MARCH 8, 1888.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 8, 1890.

1 Be it remembered that on the 29th day of April, 1884, came into the office of the clerk of the circuit court of the United States for the eastern district of Arkansas Henry M. Rector, by U. M. & G. B. Rose and F. W. Compton, Esqs., his solicitors, and filed therein, on the chancery side of said court, his original bill of complaint, in the nature of a bill of review, which is in the words and figures following, to wit:

In the United States Circuit Court for the Eastern District of Arkansas.

HENRY M. RECTOR, Plaintiff,
vs.
MATILDA LIPSCOMB, Defendant. } In Equity.

To the judges of said court, in chancery sitting:

Your orator, said Henry M. Rector, brings this his original bill, in the nature of a bill of review, against said defendant, and shows to the court that on the — day of ——, 18—, he filed his bill in chancery against said defendant in the Garland circuit court, in said State, in which he charged and set forth that about the year 1839 he entered into possession of a certain tract of land lying in the county of Garland and State of Arkansas, described as follows: Beginning at a post from which a pine ten inches in diameter, marked "H & R," bore south 47 degrees east 8 links; thence south 7 chains a creek 15 links wide runs east; at 41 chains and 25 links set a post from which a pine 15 inches in diameter bore north 47½ degrees and east 23 links; thence east 19 chains 25 links to Hot Springs creek, 25 links wide, runs south; at 41 chains and 25 links set a post from which a post-oak 18 inches in diameter bore south 86 degrees 6 links; thence north, at 41 chains and 25 links
2 set a post from which a red oak 6 inches in diameter bore south 62 degrees west 16 links; thence west 41 chains and 24 links to the beginning.

That he remained in possession of that part of said tract which will be hereinafter described from the year last aforesaid until the first day of June, 1876, when he was dispossessed thereof by a receiver appointed by the Court of Claims of the United States under an act of Congress, entitled "An act in relation to the Hot Springs reservation in Arkansas," of June 11, 1870.

That plaintiff entered into possession under a New Madrid claim which had been located on said lands and so held the same until it was decided by the Supreme Court of the United States, in the year 1875, that the said claim was invalid by reason of an informality in the proceedings relating to the location thereof, his possession being subject to that of said receiver after his appointment as aforesaid.

That upon what is now known as lot ten, in block one hundred and twenty-five, in the town of Hot Springs, Arkansas, which is part of the above-mentioned tract, plaintiff had made valuable im-

provements, consisting of gradings, excavations, and ornamenting the premises preparatory to building.

That soon after the passage of the act of Congress entitled "An act in relation to the Hot Springs reservation, in the State of Arkansas," approved March 3rd, 1879, and the appointment and qualification of the commissioners therein provided for, they caused the said premises that were leased, as above stated, to be surveyed, to be layed off in convenient squares, streets, and alleys, and a map of the same to be made, and that by the said survey and map the premises leased as aforesaid are known and described as lot ten, in block one hundred and twenty-five, in the town of Hot Springs, in said county.

That in less than six calendar months after the first sitting
3 of said board of commissioners the plaintiff filed his claim before them to purchase said lots, and that the said defendant filed a like claim, and that on a hearing of these matters before said commissioners they awarded a right to purchase said lots to said defendant, although it was fully shown to them that the said defendant had made no improvements whatever on the said premises, and that all the improvements thereon had been made by the plaintiff, and that the defendant had never had any other right or title to the said lots or to the possession thereof.

In said bill it was prayed by your orator that said defendant should be held to possess said land as trustee for the use and benefit of your orator, your orator offering in said bill to pay any sum that might be found due to said defendant by reason of any money she might have paid out for the purchase of said lands and to do all other acts which might be found to be just and equitable; and your orator therein prayed that an account might be taken between himself and said defendant, that he might be allowed reasonable rent for the occupation of said premises since the award of the commissioners, and that the said defendant be decreed to hold said lands as trustee for the plaintiff and to convey the same to him, and for such other relief as might be equitable.

As said cause involved a controversy arising under the laws of the United States the defendant afterwards removed it to this court, where she interposed a demurrer to said bill, which was sustained on the — day of ——, 18—.

Prior to and at the same time that said demurrer was sustained to said bill there were a large number of other like suits brought by your orator against various defendants for the recovery of other tracts of land, all pending on the chancery side of this court and all involving precisely the same legal and equitable questions that were involved in said suit against said defendant, among which
was the suit of your orator againt E. O. Gibbon, James M.
4 Ballentine, Henry S. Ballentine, *et al.*, in all of which suits demurrers have been interposed to the bills therein by the several defendants in said suits, all raising the same questions as that raised by the demurrer of said defendant to said bill of your orator against him.

In order to save costs and trouble it was agreed between counsel

in said suit against defendant on either side that the decision on the demurrer rendered in said court in said causes against said Gibbon *et al.* should be binding in the said suit brought by your orator against said defendant as aforesaid, and that if one of said cases should go to the Supreme Court of the United States the decision of said last-named court upon the law arising on said demurrer should be binding against said defendant.

Accordingly, your orator appealed from the decision of this court sustaining said demurrer to the bill in the suit against said Gibbon *et al.*, and the Supreme Court of the United States on the — day of April, 1884, reversed the ruling of this court, overruled said demurrer to the bill, and remanded said causes to this court; all of which facts appear of record in this court.

Your orator states and charges that all of said matters and things set forth in his original bill against said defendant are true as therein stated.

Your orator further shows that since the commencement of said suit against said defendant a patent has been issued to the defendant for said land by the President of the United States, and that defendant has remained in possession of said land ever since the execution of said lease, receiving the rents and profits thereof, which have been of great value, to wit, of the value of — dollars.

5 The premises being seen, your orator prays that said defendant may be required to answer this bill, but not under oath, and that an account may be taken between your orator and said defendant, in which said defendant shall be allowed everything that is justly due to her, to be paid out of said rents and profits, and your orator here offers, in case said rents shall not be sufficient to pay any sum that may be due to said defendant as the balance of said account, to bring the money for the payment of the same into court; and your orator further prays that said defendant may be decreed to hold said lands as a trustee for your orator and convey them to him, and for all other proper relief, and for process of subpœna against said defendant.

W. F. COMPTON.
U. M. & G. B. ROSE.

We undertake for costs in this case as usual.

U. M. & G. B. ROSE,
F. W. COMPTON,
By G. B. ROSE.

(Indorsed:) Filed and writ issued April 29th, 1884. Ralph L. Goodrich, clerk, by W. P. Feild, D. C.

6 UNITED STATES OF AMERICA, }
Eastern District of Arkansas. }

Be it remembered that a circuit court of the United States of America in and for the eastern district of Arkansas, began and holden on Monday, the fourteenth day of April, anno Domini one thousand eight hundred and eighty-four, at the United States court-

room, in the city of Little Rock, Arkansas, the Honorable Henry C. Caldwell, district judge, presiding and holding said court, the following proceedings were had, to wit, on June 27th, 1884, as follows:

H. M. RECTOR
vs.
MATILDA LIPSCOMB. } 620.

Comes the complainant, by F. W. Compton and U. M. & G. B. Rose, Esqs., his solicitors, and files herein his amendment to bill; which amendment to bill is as follows:

United States Circuit Court, Eastern District of Arkansas.

H. M. RECTOR
v.
MATILDA LIPSCOMB.

The plaintiff, by way of amendment to the bill of complaint herein, says—

That at the time of filing his said claim before said board of commissioners to purchase said lands, as mentioned in his said
7 bill, he set forth more specifically and fully the grounds of said claim in a petition in that behalf then filed before said commissioners, to which was attached, as Exhibit "L," a plat and field-notes, showing the boundaries of the said claim of the said plaintiff and the locality and extent of the improvements made by him thereon, an authenticated copy of which said petition and of said plat and field-notes, attached thereto as Exhibit "L," are hereto attached, marked Exhibit "A," and are prayed to be taken and considered as part hereof.

That the claim of said plaintiff and the claim of the said Matilda Lipscomb were heard and considered by the said commissioners upon the evidence introduced before them by the said claimants in support of their respective claims, an authenticated copy of which said evidence is hereto attached, marked Exhibit "B," and made part hereof; and the plaintiff avers that no other or further evidence than that set forth in said Exhibit "B" was introduced before said commissioners touching said claim or either of them.

That the commissioners having awarded the right to purchase said lots to the said Matilda Lipscomb, as alleged in the bill herein, a patent of the United States, bearing date the — day of ——, 188–, has been issued to her, under which she now claims title to and holds possession of the land in the bill mentioned.

W. F. COMPTON.
U. M. & G. B. ROSE.

(Indorsed:) Filed June 27th, 1884. Ralph L. Goodrich, clerk.

And on June 30th, 1884, as follows:

8 H. M. RECTOR
v.
MATILDA LIPSCOMB. } 620.

Comes the defendant, by Clark & Williams, Esqs., her solicitors, and files herein her answer; which answer is as follows:

In the United States Circuit Court for the Eastern District of Arkansas.

HENRY M. RECTOR, Plaintiff,
vs.
MATILDA LIPSCOMB, Defendant.

Defendant, Tilly Lipscomb, denies that plaintiff, Henry M. Rector, ever entered into possession of the ground described in his complaint in 1839 or any at other time as stated; she is informed that he got possession of some improvements and a part of the Hot Springs by purchase from a man named Mitchell, who had gotten it from a man named Woods, who had bought the same from the heirs of John Perciful, who had occupied it and had a pre-emption long before this pretended location of the New Madrid claim set out in the complaint; that when complainant bought these improvements they were on the southwest quarter of section thirty-three, township two south, range nineteen west, and the lots in controversy in this suit are on the southeast quarter of said section, and it is not true that he remained in possession of any other part except the Mitchell improvement which he bought, and this did not include the lots in controversy in this case. Complainant never was in possession of said lots or any part of them at any time.

That lot ten, in block one hundred and twenty-five, or any
9 part of it —, and the defendant states that it is entirely false that plaintiff ever at any time had any improvements upon said lot or near it any kind — habitation. At the time he bought the improvements of Mitchell and took possession of them they were in the limit of the village of Hot Springs; both settlers and squatters all around and up to the line of said possession, which included only a few acres, and these squatter settlements had held independent of and adverse to plaintiff and had been for years before, and are still held, and ever have been, and these improvements and settlements were all over the valley of Hot Springs, within the limits of said pretended possesssion, cutting it up into parcels—here a settlement and a house and there an unoccupied piece of wild land. This the defendant is informed and believes to be true. This defendant knows that when she came to the Springs, about July, 1885, the ground was unoccupied within these limits of the now pretended claims by settlers who did not claim under Rector.

In 1875 she found that there was a piece of wild unoccupied land up in a gorge of the mountain, east of Hot Springs creek, away from

the possession of Gov. Rector or any one else, and she put on it and built a cabin beside the branch and cleared up the ground for a yard to wash clothes to use. She is a colored woman and makes her living by washing, and it, this lot, was in the wild woods, occupied by no one until she took possession and improved it for herself; and plaintiff never had said lot in his possession at any time nor did he make any improvements there or cause them to be made or pay for them when made. Defendant made the improvements there and defendant never leased or rented it from plaintiff, and he never paid or offered to pay her for her improvements at any time on said lot; that the lot she improved was nothing but wild woods when she went on it and was, as improved by her, on both sides of what is now called Fountain Street branch; the branch split her lot in two;
10 that she made this improvement on this lot in August, 1875, finding the place vacant and unoccupied Government land up the canyon and gorge between the Hot Springs Mountain and the mountain north of it, and there in the wild woods found her a place to build, which took both sides of the little branch that came down the gorge, and there she built her cabin, first getting a man to clear up the ground, for which she paid him five dollars, and burnt the brush herself, and got a man to furnish the lumber and build the house, for which she paid one hundred and forty-five dollars, and went into the house in the fall of 1875, about 15th day of October, and she has owned and occupied the lot ever since, and it is and has ever since been her only house. When Mr. Morgan, the receiver, came to the Springs, in 1876, she paid him rent as long as anybody at the Springs paid rent. Defendant made all the improvements on said lot and once paid the same on the 3rd day of March, 1877; that within less than six months after the commissioners had come to the Springs to lay the ground off and hear the claims proved she put in her claim and proved it, and the commissioners after seizing her claim laid off the town, and her house was thrown into the street by the survey and was condemned. She bought the house at public sale, from the commissioners. They had given her a certificate for its value, and after buying it she moved it across the branch, on the lot which plaintiff claims in this suit, which was part of the premises occupied by her, and had been cleared up and used by her as a back yard to dry clothes, and upon which plaintiff never had any improvements or occupancy, and it was joining the ground defendant's house stood on, which they had put in the street, and defendant moved the house on it. She had put in her claim for the ground on both sides of the branch before it was laid off, and when the ground her house was on was taken for the street the commissioners gave her, on the north side of the branch, some land north of her first claim in addition to it,
11 which was at the time unoccupied and without improvements and was in that condition on the third day of March, 1877, and, together with that occupied by defendant, made and now designated as lot ten, in block one hundred and twenty-five, but the whole of the lot was less in quantity than the claim which defendant put in, and did not lie as well; yet it is not true that plaintiff

ever occupied or improved any part of said lot, and defendant never rented it from him or paid him rent or owed him any duty as a tenant, nor to any one any rent for him, nor did plaintiff ever have any possession or right of possession to said lot, which was the land of the United States until sold to her. Defendant paid the United States the price of said land as awarded by said commissioners and which — fixed and reduced by act of Congress and now has to be thereto. She is informed that Rector brought a suit in the Court of Claims, claiming this land he describes in his bill by metes and bounds, and the Supreme Court of the United States decided he had no title; that Congress then directed that a receiver be appointed by the Court of Claims, which was done, and defendant paid him, said receiver, rent for some time; that in March, 1877, Congress passed an act providing that the land should be surveyed, and each person occupying or owning improvements was to have the right of purchase to buy the lots. This defendant, being an occupant and owner of improvements on said lot, availed herself thereof, and plaintiff, by this and other suits, seems to be endeavoring to re-establish his old New Madrid claim; that it is true that the commissioners were appointed, qualified, and organized, and sat at Hot Springs and surveyed the Hot Springs land and made a map of it, and in less than six calendar months, and within twelve months after March 3rd, 1877, she is informed that Rector filed his petition befor the commissioners to purchase this lot and she filed a claim before the commissioners to buy it, setting up her said improvements and occupancy within
12 the same time, and showed and proved fully her right before said commissioners, and the proposed right to purchase the lot was awarded defendant, and she claims that nothing was shown before the commissioners except what she states here, and it was shown that plaintiff had never even for a day occupied the premises in suit, and that he had never created the slightest improvement upon the lot or paid for the same or offered to do so, and that he was not entitled to the lot, and the allegations of the complainant to the controversy are untrue. The commissioners fully heard all the evidence and had plaintiff and defendant and all their witnesses before them, and examined the case and all the fact and claims, and the defendant submits that this was a final adjudication of the matter which is here set up and relied on, and she asks the same benefit as though set up by plea, and, if need be, asks leave to exhibit the record of the same as it now appears in the General Land Office, by which it will there fully appear what is true; that a suit was brought and transferred into this court, in which these matters were set up, which was filed on the 30th of September, 1880, to which defendant filed a demurrer, which was sustained and said bill was dismissed, and defendant denies that any such assessment was made as is set forth in the certificate, to the effect that the rights were to be dependent upon the result of a decision of the Supreme Court of the United States in another cause. This is untrue, because she had not employed her counsel except for this case, and they informed her that a demurrer was filed in said case and an agreement would be — hers and others in

which like questions of law were *resolved;* that one agreement should be made, and that as this honorable court decided one a like entry would be made in all, and no reference was made to the Supreme Court of the United States in any case; that if the demurrer had been over ruled — would have answered in her own way; that pursuant to this agreement that the cases were so argued and so decided,
13 and plaintiff took an appeal. Afterwards plaintiff, as she is informed and believes, desiring to save the expense of filing so many transcripts in the Supreme Court, neglected to do so, when defendant's counsel, before the meeting of the Supreme Court of the United States in October, 1881, and before the end of the April term, 1881, of this court, at which this cause was decided, notified plaintiff's counsel that she would have to dismiss said appeal in December, 1881, before the Supreme Court, said counsel having learned that this extraordinary construction was put upon said agreement claimed here. The plaintiff then, during said April term, to wit, on the 22nd day of October, 1881, moved this court to so construe said agreement and to set aside said decree in said cause, which this court refused to do, and the Supreme Court of the United States dismissed his appeal therein, though plaintiff had ample notice and opportunity to prosecute it, not relying upon his right to file a bill of review, he failed to do so, and it is utterly false that any said absurd assessment was made, as she is informed, and, if it was, it was without authority. Reference is made to the records of this court in reference to this matter. The said bill of review was filed out of time and without leave of this honorable court, and the plaintiff was decreed to accept its consequences by falsely stating that an agreement was made, which this court, in said cause, after full hearing, decided was never made. Defendant sets up the statute of limitation to said bill of review and demurs to the same for this and other causes, and prays that she may have the benefit of her demurrer on said final hearing; and, as the plaintiff denies rents in his said bill, the defendant, by way of answer and cross-bill, states that she improved said lot when it was wild and unoccupied Government land; that outside of her improvements it had no rental value; that said improvements are now valuable; that the improvements are lasting and permanent and are worth three thou-
14 sand dollars, consisting of excavations and buildings, and the like; that she improved the same as Government land; and defendant sets up and relies upon the provisions of the statute, Gantt's Digest, section 2260, that provides that where any one may have entered in any land office of the United States within this State the improvements of the defendant and the action is brought to recover the possession of such improvements, the plaintiff shall recover no damages, and should it turn out no entry and the court be of opinion that this entry was in legal effect for the plaintiff, defendant, in that aspect of the case, prays that she may be excused from rents for her own improvements, and, under the provisions of the betterment act of the State of Arkansas approved March 8th, 1883, that she be allowed pay for her improvements and taxes paid

on said land which have been paid by her; and, having fully answered, she prays to be hence dismissed with her costs.

CLARK & WILLIAMS,
For Defendant.

(Indorsed:) Filed June 30th, 1884. Ralph L. Goodrich, clerk.

UNITED STATES OF AMERICA, }
Eastern District of Arkansas. }

Be it remembered that at a circuit court of the United States of America in and for the eastern district of Arkansas, begun and holden on Monday, the 27th day of October, anno Domini one thousand eight hundred and eighty-four, at the United States court-room, in the city of Little Rock, Arkansas, the Honorable Henry C. Caldwell, district judge, presiding and holding said court, the following proceedings were had, to wit, on Feb. 10th, 1885, as follows:

15 HENRY M. RECTOR }
vs. } 620.
MATILDA LIPSCOMB. }

Comes the complainant, by U. M. & G. B. Rose, Esqs., his solicitors, and files herein his replication to answer; which replication is as follows:

United States Circuit Court, Eastern District of Arkansas.

HENRY M. RECTOR }
vs. } Replication.
MATILDA LIPSCOMB. }

This repliant, for reply to the answer herein, doth say that he will aver, maintain, and prove his said bill to be true, certain, and sufficient in law to — answered unto by the said defendant, and that the answer of the said defendant is very uncertain, evasive, and insufficient in law to — replied unto by this repliant; without that, that anything in said answer contained and not herein sufficiently replied to, denied, or confessed and avoided, is true; all of which this repliant is ready to maintain and prove, and he will ever pray as in his original bill.

F. W. COMPTON.
U. M. & G. B. ROSE.

(Indorsed:) Filed Feb. 10th, 1885. Ralph L. Goodrich, clerk.

16 UNITED STATES OF AMERICA, }
Eastern District of Arkansas. }

Be it remembered that at a circuit court of the United States of America in and for the eastern district of Arkansas, begun and holden on Monday, the 12th day of April, anno Domini one thousand eight hundred and eighty-six, at the United States court-room,

in the city of Little Rock, Arkansas, the Honorable Henry C. Caldwell, district judge, presiding and holding said court, the following proceedings were had, to wit, on April 22nd, 1886, as follows:

HENRY M. RECTOR
vs.
TILLY LIPSCOMB.

This cause is regularly heard upon bill and exhibits, answer and exhibits, depositions on file, and the testimony and papers of the Hot Springs commission and other documents and papers on file in the cause, including the original bill and proceedings thereon, and, having heard argument and being advised, the court orders, adjudges, and decrees that the original bill and bill of review be dismissed for want of equity, and that defendant recover from the plaintiff all her costs.

And on the hearing the following deposition was read:

UNITED STATES OF AMERICA,
Eastern District of Arkansas.

The depositions of H. M. Rector, J. M. Kinkead, Matilda Lipscomb, Anna Crawford, taken on Jan. 30th and Feb. 1st, 1886, at
17 the office of Ralph L. Goodrich, commissioner of the U. S. circuit court, east. dist. Ark., to be read in evidence in an action between Henry M. Rector, complainant, and Matilda Lipscomb, defendant, pending in the circuit court of the United States for the eastern district of Arkansas.

H. M. RECTOR
vs.
MATILDA LIPSCOMB.
No. 620. Ch'c'y.
Taken Jan. 30th, 1886.

H. M. RECTOR, being duly sworn, deposes and says:

I am the plaintiff in the above-entitled cause and reside at Little Rock. In the summer of 1875 Matilda Lipscomb, the defendant, was a servant in my bath-house at Hot Springs, Arkansas, and at that time she applied to me for lease of a lot upon my property in Hot Springs, upon which she wanted to build a house to reside in, saying she had no place to stay. The suit in the U. S. Supreme Court had then been commenced, or was about to be, which would settle the title to the property I claimed at that place. For this and other reasons I declined to make a lease to "Tillie," but told her I would build her a house and rent it to her—the house and lot—at five dollars per month, provided she would pay me what money she had towards building the house, which amount should be credited to her as so much rent paid. She did pay to my agent, Wilson Stidham, an amount of money, from $45 to $60, whereupon I drew up an article of agreement with "Tillie" to that effect, signed it myself, and read it to her—I do not recollect whether she signed it or not—which article of agreement or lease I have lost. She as-

sented to the terms of the lease or contract. I went up with "Tillie"
to the point where the house was to be built, on what is now
18 Fountain street, and the location where the house was after-
wards erected is marked on the plat which is filed in this court and attached to my petition as Exhibit "L" and to the bill as Exhibit "7," as building or improvement No. 41. Immediately subsequent to this agreement I employed Mr. John Kinkead to build a house for "Tillie" at the point indicated, which he did. As he proceeded with the work he drew money from Mr. Wilson Stidham, who was then my agent, as payment for his labor, in the aggregate equal to the amount "Tillie" had paid me and something in excess of that—I do not recollect how much. In the contract the house was to be limited in the amount to be paid for its construction to a certain amount of money, according to my recollection, $75 or $80; but "Tillie" had some additional rooms, porches or easements attached to the house, for which she paid herself, which additional amounts, it was understood between her and me, was to be credited to her on account of rent. Upon examination of the map alluded to it will be seen that this house, No. 41 on the plat, in surveying the town under the direction of the Hot Springs commission, fell into the street now known as Fountain street. My impression is that upon an exact laying down of the house according to the dimensions that the north half of said house fell into the street and the south half on the hot-water reservation—the Hot Springs reservation and also the street being reserved from sale. In my testimony before the Hot Springs commission it will be found that I stated that I did not desire the house, insomuch that I would be unable to purchase the land, it being reserved. The lot of ground upon which I laid off to build that house fronted north some thirty or forty feet and run back some seventy or eighty feet, I think, but "Tillie," in filing her claim and making out her plat for the land she claimed, not only included her house, but ran across the branch and across the street over onto lot ten of the present Hot Springs
City map, the house and lot that I rented her being in a different
19 locality altogether. I was not apprised that she filed any
application or made any claim to lot ten before the commissioners. Supposing this, I did not examine her application to purchase land, knowing full well that she could not claim or acquire a title nor could I to the house and lot I had leased to her. The lot that was awarded to her by the commissioners embraced no part of the lot I leased to her, and is land upon which she never made any improvements of any kind. It was land which was always in my possession and which I claimed as my own, and was included in a claim filed by me before the commissioners. The lots on either side of it were awarded to me by the commissioners. Under the act of Congress these improvements which fell into the street or on the hot-water reservation were directed to be sold, and that house, No. 41, was by the commissioners sold, and I believe "Tillie." bought it, as I understood. The house has been removed.

By Judge WILLIAMS—cross-ex.:

Ques. 1. When you speak of "Tillie" Lipscomb as being a servant of yours at your bath-house do you mean to say or to be understood that she was employed upon stipulated wages, or do you mean to be understood as saying that she served at your bath-house in attending to lady bathers and received her compensation in the fees paid her by your customers, according to the usual custom?

Ans. Tillie Lipscomb was employed as a servant at my bath-house. We gave access in the bath-house to such servants as we select and admit—no others. The remuneration that Tillie received and which all servants received at bath-houses in Hot Springs is what the patrons of the bath-houses see proper to give
20 them. Under a regulation recently of the Department of the Interior we still select our own servants, but by that regulation we are required to restrict the servants to $1 per week for each bather, or rather the patrons of the house are required to pay them that much at least. This was not the case when Tillie was employed in my bath-house, as the Government had not then obtained possession of the property. Ladies gave Tillie what they saw proper to bestow upon her.

Ques. 2. Do you know whether or not Stidham, who was in charge of the bath-house for you, did not keep money of Tillie Lipscomb and other servants for safe keeping in the safe, and whether or not he did not often receive for the servants the compensation paid by the bathers?

Ans. During Mr. Stidham's employment he had no safe in the bath-house nor have I any now. During his encumbency he was required to take the money received during the day and pay it over to my daughter, Mrs. E. R. Foreman, at night, and upon his requisitions or orders the money was redisbursed by him to carpenters and other employees about the valley. I gave my daughter charge of this branch of the business because I was often absent. I think I then lived in Little Rock.

Ques. 3. Did you not have an office and place of business at Hot Springs at that time and continuously until the close and sitting of the board of commissioners, and were you not frequently there and have a general knowledge and cognizance of your business there?

A. I go frequently to Hot Springs now and have gone since 1836 very frequently. I have cognizance of my business there
21 always—by letter or otherwise. I think in the year 1875 I gave up the practice of law to my son, E. W. Rector. I don't think I had an office there at that time. I had a sleeping-room there somewhere about the premises—sometimes in one building and sometimes in another. I transacted all my business there in my sleeping-room, as I do now, after I gave up my law office there.

Ques. 4. When Stidham drew money from Mrs. Foreman for disbursement do you know how long at any time he kept it before disbursement?

Ans. Mr. Stidham made a payment if he had the money in the office the day he made the payment; paid the money out of the

money he had in his possession and returned Mrs. Foreman the receipt or an account of the disbursement. I do not know how long he kept the money, unless I was present when he paid it out on demand. When I was absent, of course, I don't know.

H. M. RECTOR.

J. M. KINKEAD, a witness on behalf of plaintiff, after being duly sworn, deposes and says:

My name is J. M. Kinkead; reside at Hot Springs; occupation, builder. I built a house for Tillie Lipscomb in 1875. My contract was with her. The first payments on the contract were made by her. The last payments were paid by Mr. Stidham.

Paper hereto exhibited to me and which I attach to my deposition as Exhibit "A" is the receipt given by me to Mr. Stidham for the last payment on this contract. It is in my handwriting. The house is in what was then known as "Happy Hollow," but now
22 called Fountain street. This house was almost directly across the street from where Tillie's house now stands.

Mr. Stidham was acting as Gov. Rector's agent at that time, in charge of the bath-house. The contract was for $125.00 and a porch, extra, for $10.00. I am not positive, but I think I got all the money for the building from Tillie, except as stated above.

J. M. KINKEAD.

FEBRUARY 1ST, 1886.

J. M. KINKEAD, being recalled by plaintiffs, testified as follows:

I know Matilde Lipscomb; have known her ten or eleven years. About the time I was building the house mentioned in my foregoing deposition I had a conversation with her, in which she told me that she was going to lease the ground from Gov. Rector, paying him $5.00 per month rent.

Cross-examination by Col. HARRELL:

Ques. 1. Did she tell you that she was to comply with the terms of contract on her part on condition that Gov. Rector complied with terms on his part, and that on his part he was to furnish the money or a part of it for building a house on the ground?

Ans. I never heard anything of the kind.

Ques. 2. Did you ever hear Gov. Rector or any one else say, as his agent, that Rector was to furnish any part of the money expended in the building of said house?

Ans. No, sir.

J. M. KINKEAD.

HOT SPRINGS, ARK, *Sep.* 23, 1875.

Received of W. Stidham forty-five dollars ($45), being the balance due on house built for Tilly Lipscomb.

J. M. KINKEAD.

Exhibit "A" to deposition J. M. Kinkead.

23 FEBRUARY 1ST.

MATILDA LIPSCOMB, the defendant in the above —, after being duly sworn, deposes and says:

I am the defendant in this cause. I have testified heretofore in regard to this claim before the Hot Springs commission. Gov. Rector also testified heretofore before said commission in regard to said claim. I was awarded lot ten; on Fountain street, across said street from the ground on which the house Wm. Kinkead built was erected. The ground where the house stood was taken by the said street; the ground south of the house was taken by the Hot Springs reservation for the Government. I had one shed made of planks, which is standing there now, put upon the ground laid off as lot ten. I washed in that shed. I had the shed erected in the fall of 1875. I also chopped the bushes and burned them; removed the stones from the ground where said lot ten now is at the same time I put up the shed. The improvements I have made on the ground since the award have cost me about $1,500.00. I was working at Gov. Rector's bath-house in the spring of 1875; I was not employed by him. I asked him if I could build a house up there, on the ground where Mr. Kinkead afterwards built the house; and he said, Yes; go on and build it. I made no agreement to pay rent for it. I built the house out of my own means, every dollar. The forty-five dollars I got from Mr. Stidham I had deposited with him. I received pay for waiting on lady bathers, usually five dollars per week; some cases ten dollars per week. Sometimes I would have as many as twenty or twenty-five per week, but they all didn't bathe every week. I made from $60 to $80 per week when business was good. I made deposits with Mr. Stidham, from time to time, when he clerked for Gov. Rector, and, in fact, before he clerked for Gov. Rector

24 The house which Kinkead built was condemned and the condemned certificate given to me as of an improvement which had been decided by the Hot Springs commission to be mine. I bought the said house from the Government and moved it across the street on lot ten, where it now is. I never told Mr. Kinkead that I had rented the ground from Gov. Rector and was to pay $5.00 per month rent. Mr. Kinkead says I did. I do not remember any such statement. I had no right to make any such statement. I asked Gov. Rector about building there because he claimed the ground inside of the fence. I didn't know but that he might claim ground outside of the fence; some said — was his and some said it was the Government's. The fence alluded to encloses wagon yard and stable. The house I had built back of this enclosure—that is, east of it in the woods. I paid Mr. Kinkead $90 myself, and Mr. Stidham paid him $45 on my order. These payments included work and material.

her
MATILDA x LIPSCOMB.
mark.

Witness:
W. D. FEILD.

ANNA CRAWFORD, a witness in behalf of defendant, after being duly sworn, deposes and says:

My name is Anna Crawford, I have known Matilda Lipscomb since 1873; formed her acquaintance at Hot Springs in 1873. We both bathed lady bathers. She worked at the Rector bath-house in 1873. I knew Mr. Wilson Stidham. She deposited her money with him at that time. I deposited with Mr. Walter Moore. I would take in for my services every other week $75 or $80. "Tillie" built the house back of the Rector stable, up Happy Hollow, in the spring of 1875. She built the shed across the street for a wash-house the same year, in the fall.

her
ANNA x CRAWFORD.
mark.

Witness:
W. P. FEILD.

25 UNITED STATES OF AMERICA,
Eastern District of Arkansas.

I, Ralph L. Goodrich, a commissioner of the circuit court of the United States for the eastern district of Arkansas, do certify that the foregoing depositions of Henry M. Rector, J. M. Kinkead, Matilda Lipscomb, and Anna Crawford were taken before me and were read to and subscribed by them in my presence at the time and place and in the action mentioned in the caption, the witnesses having been first sworn by me that the evidence they should give in the action should be the truth, the whole truth, and nothing but the truth, and that the statements were reduced to writing by my clerk in their presence, the plaintiff and defendant both being present during the examination.

In witness whereof I have hereunto set my hand and seal this 1st day of February, A. D. 1886.

RALPH L. GOODRICH,
Com. U. S. Circ't Court, East. Dist. Ark.

Deps., $5.

(Indorsed:) Filed Feb. 1st, 1886. Ralph L. Goodrich, clerk, by W. P. Feild, D. C.

UNITED STATES OF AMERICA,
Eastern District of Arkansas.

Be it remembered that at a circuit court of the United States of America in and for the eastern district of Arkansas, begun and holden on Monday, the 27th day of October, anno Domini one thousand eight hundred and eighty-seven, at the United States
26 court-room, in the city of Little Rock, Arkansas, the Honorable Henry C. Caldwell, district judge, presiding and holding said court, the following proceedings were had, to wit, on February 9th, 1880, as follows:

HENRY M. RECTOR
vs. } 620.
MATILDA LIPSCOMB.

Comes the complainant and prays an appeal to the Supreme Court of the United States from the decree rendered herein on the 26th day of April, 1886, which is granted.

And on the same day the following affidavit was filed:

United States Circuit Court, Eastern District of Arkansas.

HENRY M. RECTOR
v.
MATILDA LIPSCOMB.

I state that I am familiar with the property involved in this suit, and that its value exceeds the sum of five thousand dollars.

H. M. RECTOR.

Subscribed and sworn to before me this 9th day of February, 1888.

RALPH L. GOODRICH, *Clerk*,
By W. P. FEILD, *D. C.*

(Indorsed:) Filed Feb. 9th, 1888. Ralph L. Goodrich, clerk.

27 And on February 17th, 1888, as follows:

HENRY M. RECTOR
vs. } 620.
MATILDA LIPSCOMB.

Comes the complainant, by U. M. & G. B. Rose, Esqs., his solicitors, and files herein his citation, which is signed by the judge of this court; which citation is as follows:

28 The United States of America, Greeting to Matilda Lipscomb:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to an appeal prayed by the complainant in a cause wherein Henry M. Rector is complainant and you are defendant, to show cause, if any there be, why the decree rendered against the said complainant in the United States circuit court for the eastern district of Arkansas should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Henry C. Caldwell, judge of the district court, this 9th day of February, A. D. 1888.

{ The Seal of the Circuit Court U. S. A., Western Division of East. Dist. Ark. }

HENRY C. CALDWELL,
U. S. Dist. Judge, East. Dist. Ark.

29 In obedience to the within writ I have summoned the within-named Matilda Lipscomb by delivering into her hands a true and correct copy of the same, at Hot Springs, Garland county, in the eastern district of Arkansas, this the 13th day of Febr'y, 1888.

THOMAS FLETCHER,
U. S. Marshal,
By F. F. KIMBELL, *Dep'ty.*

Marshal's fees:

66 m'l's, @ 6	3 95
1 service	2 00
	5 95

[Endorsed:] 620. H. M. Rector *v.* M. Lipscomb. Original.

30 UNITED STATES OF AMERICA, }
Eastern District of Arkansas. }

I, Ralph L. Goodrich, clerk of the circuit court of the United States for the eastern district of Arkansas, in the eighth circuit, hereby certify that the foregoing writings annexed to this certificate are true, correct, and compared copies of the original remaining of record in my office.

The Seal of the Circuit Court U. S. A., Western Division of East. Dist. Ark.

In witness whereof I have hereunto set my hand and the seal of said court this 17th day of February, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United States of America the one hundred and twelfth.

Attest: RALPH L. GOODRICH, *Clerk.*

Endorsed on cover: E. Arkansas C. C. U. S. No. 341. Henry M. Rector, appellant, *vs.* Matilda Lipscomb. Filed March 8, 1888.

[Stamped:] Office Supreme Court U. S. Filed Mar. 6, 1888. James H. McKenney, clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 341.

HENRY M. RECTOR, APPELLANT,

vs.

MATILDA LIPSCOMB.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., APRIL 22, 1891.

1 Supreme Court of the United States.

HENRY M. RECTOR
v.
MATILDA LIPSCOMB.

It is agreed that the attached papers, which were part of the record in the court below and were omitted from the transcript by inadvertence of the clerk of said court, may be taken as a part of the record in this case the same as though regularly brought up by writ of certiorari.

JOHN McCLURE,
For Defendant.
A. H. GARLAND,
H. J. MAY,
For Appellant.

2 * * * * * * *

UNITED STATES OF AMERICA:

HOT SPRINGS COMMISSION,
HOT SPRINGS, ARKANSAS, *July 6th, A. D.* 1877.

In the Matter of the Claim of MATILDA LIPSCOMB.

To the Hot Springs Commission:

The petitioner, Matilda Lipscomb, now residing at Hot Springs, Garland county, in the State of Arkansas, represents that she claims the following-described tract of land, a map of which is filed herewith and made a part hereof, situated in Hot Springs reservation, which tract is bounded as follows, to wit:

On the north & east by the New Madrid location, with a line running N. 50° W. 200 ft.; on the north and west by the New Madrid location, with a line running S. 40° W. 100 ft.; on the south & west by the claim of Maurice & Moore, with a line running S. 50° E. 200 ft.; on the south and east by Hot Springs Mountain, with a line running north 40° E. 100 ft. to the place of commencement, lying and being in the S. W. ¼ of the N. W. ¼ of sec. 33, T. 2 S., R. 19 W.

That the following-described improvements are situated thereon, to wit: A one-story frame dwelling-house 14 x 20 feet; that they were erected by Matilda Lipscomb in the month of August & Sept., in the year 1875; that they are of the value of three hundred ($300) dollars. The petitioner further says that she claims to be the owner of the said premises and entitled to purchase the same from the United States upon the following ground, to wit: That she entered upon said above-described premises by permission of Henry M. Rector in 1875, and that said premises were unimproved and occu-

3 pied at the time she made all of the above-described improvements as above stated, and she has had peaceable possession of said premises ever since said occupancy and has ever since and now resides thereon and knows of no other claimants for any portion of said claim, and that she claims all the

rights and benefits that may accrue to any squatter upon the U. S. reservation.

Map Matilda Lipscomb's Claim.

(Here follows map marked p. 854.)

The petitioner files herewith copies of the documents hereinbefore referred to and makes them a part hereof.

Whereas she prays that the commissioners shall adjudge to her the right to purchase said premises from the United States, and for other proper relief.

her
MATILDA x LEPSCOMB.
mark.

Witness to signature:
GEO. M. FRENCH.

Endorsements: Co. 527. No. 303. Hot Springs Commission. Petition of Matilda Lepscomb. Lot 10, block 125. Filed August 2nd, 1877. J. W. Anderson, cl'k H. S. Com. Examined January 26th, 1878. Recor. B. 2, p. 417. Adjudicated October 31st, 1879.

In the Claim of MATILDA LIPSCOMB. No. 303.

MATILDA LIPSCOMB sworn & examined:

Q. State your name, age, and residence.

A. Matilda Lipscomb; age, 29, and reside at Hot Springs.

Q. Look at that plat and see if it is a description of your house and the *house* it stands on.

A. Yes, sir.

Q. State how long you have known the premises, when you occupied them, who built your house, the size of it, what it cost
4 you, and the year you built it.

A. I built it in 1875, in the summer. I got the ground from Gov. Rector in August, 1875, and the house was built in September, 1875. I moved into the house October 27th. It cost $150.

Q. Was there any improvements on the ground when you occupied it?

A. No, sir; no improvements at all.

Q. State whether you have lived there in continuous occupation ever since.

A. Yes, sir; I still have possession of the premises. I paid the receiver & 60 dollars rent.

(By Commissioner COBURB:)

Q. Has that been fenced?

A. No, sir; it has been cleared, not fenced.

Q. Ever cultivated?

A. No, sir; simply had a house there.

Q. Is that your home?

A. I claim it my home as long as I am on it; have lived there since 1875 up to now.

Cross-examined by Gov. RECTOR:

Q. You say that there were no improvements on the ground when you went there. You mean no house?

A. There was not any house.

Q. The ground was cleared and the trees cut down, suitable to build upon?

A. Yes, sir.

Q. Cleared out by me and in my possession when you got it?

A. Yes, sir; I asked your permission to build a fence around it.

Endorsements: No. 303. In the claim of Matilda Lipscomb. Testimony of Matilda Jenkins, given before the Hot Springs Commission.

5 French's Hotel (European plan); G. M. French, proprietor.

HOT SPRINGS, ARK., *Nov. 25th*, 1879.

To the Hot Springs Commission.

GENTLEMEN: Please deliver my certificate for right to purchase any lots on the Hot Springs reservation to Mr. Geo. M. French, my attorney, who is hereby authorized to receive and receipt for same.

her
MATILDA x LIPSCOMB.
mark.

Witness- to signature:
G. M. FRENCH.
C. M. SAGE.

FRIDAY, *October 31st*, 1879.

In the Claim of MATILDA LIPSCOMB. No. 303.

At this times comes the petitioner, Matilda Lipscomb, and the commission, having heard and considered the petition and testimony, as also *as also* the testimony in claim No. 636, Henry M. Rector, and claim 644, Mary A. Washington, do say and find that the claim of the petitioner accrued prior to the twenty-fourth day of April, A. D. 1876, by reason of the use, occupation, and improvement of the premises described in the petition, and that the petitioner is the owner and entitled to the possession of the improvements made thereon; and the commission, having had the premises surveyed and having inspected and caused the same to be platted, numbered, and scheduled, and having apprai-ed the same as provided by law, and being sufficiently advised in the premises, doth further say and find that the petitioner is entitled to purchase from the United States the following-described land in Hot Springs, to wit, lot numbered ten, in block numbered one hundred and twenty-five, for the sum of two hundred dollars, that being the appraised value thereof.

6 It is therefore ordered and adjudged that the said Matilda Lipscomb is entitled to purchase said lot numbered ten, in block numbered one hundred and twenty-five, for said sum of two

hundred dollars, and that said certificate be issued to her for the right to purchase the same, containing 14,320 feet.

Adjourned until to-morrow at 9 a. m.

AARON H. CRAGIN, *Chairman.*

DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE,
WASHINGTON, D. C., *March 7th*, 1885.

I, N. C. McFarland, Commissioner of the General Land Office, do hereby certify that the annexed copies of petition No. 152, before the Hot Springs Commission, the testimony & findings of the commission in the matter of the claim of Matilda Lipscomb, are true and literal exemplifications of the originals on file and on record in this office.

In testimony I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[L. S.]

N. C. McFARLAND,
Commissioner of General Land Office.

* * * * * * *

7 In the Circuit Court of the United States, Eastern District of Arkansas.

HENRY M. RECTOR
vs.
TILLIE LIPSCOMB.

Now comes the defendant, Tillie Lipscomb, and state-, at a former day of this term of the court, this honorable court made an order in the above-entitled cause granting the complainant an appeal.

Defendant states that said appeal was erroneously and improvidently granted, and prays the court to set aside the order granting the same for the following cause, to wit:

That the property in dispute in the above-entitled cause is not of the value of five thousand dollars, exclusive of costs.

The defendant herewith files the affidavits of Robert L. Williams, W. H. Moyston, O. F. Smith, D. C. Rugg, Wm. P. Blade, Geo. W. Baxter, E. Burgauer, Chas. W. Field, Chas. N. Rix, E. H. Johnson, J. D. Kimball, William Hunt, Geo. M. French, M. C. O'Bryan, P. D. Martin, and John D. Ware in support of said motion, the aforementioned persons being residents and citizens of Hot Springs, Ark., and acquainted with the property in dispute and the value thereof.

JOHN McCLURE,
Of Counsel for Defendant.

Endorsed: Filed March 14th, 1888. Ralph L. Goodrich, clerk.

8 In the Circuit Court of the United States, Eastern District of Arkansas.

HENRY M. RECTOR
vs.
TILLIE LIPSCOMB.

Rob't L. Williams, first being duly sworn, states he is the sheriff and *ex officio* collector of taxes in and for the county of Garland, State of Arkansas, in which the property in dispute in the above-entitled cause is situate; that said lot, with all improvements thereon, was appraised for taxation in the year 1887 at $640.00; that he is acquainted with the value of property in the city of Hot Springs, and that said lot is of the value of $2,000 and the improvements of the value of -1,000.

R. L. WILLIAMS.

Sworn to and subscribed before me this 9th day of March, 1888.
[L. S.] JOHN D. WARE,
Notary Public.

Endorsed: Filed March 14, 1888. Ralph L. Goodrich, clerk.

9 In the Circuit Court of the United States, Eastern District of Arkansas.

HENRY M. RECTOR
vs.
TILLIE LIPSCOMB.

George W. Baxter, first being duly sworn, states that he is a real-estate agent and broker in the city of Hot Springs, Arkansas, and has been for twelve years last past; that he is acquainted with the value of the property in dispute in the above-entitled cause, and that the lot is of the value of $2,500 and the buildings of the value of $1,000.

GEO. W. BAXTER.

Sworn to and subscribed before me this 9th day of March, 1888.
[L. S.] WM. HUNT,
Notary Public.

Endorsed: Filed March 14, 1888. Ralph L. Goodrich, clerk.

10 In the Circuit Court of the United States, Eastern District of Arkansas.

HENRY M. RECTOR
vs.
TILLIE LIPSCOMB.

William Hunt, first being duly sworn, states that he is a real-estate agent and broker in the city of Hot Springs, Arkansas, and has been for nearly four years last past; that he is acquainted with the

value of the property in dispute in the above-entitled cause, and that the lot is of the value of $2,000 and the buildings of the value of one thousand dollars.

WM. HUNT.

Sworn to and subscribed before me this 9th day of March, 1888.
[L. S.] JOHN D. WARE,
Notary Public.

Endorsed: Filed March 14, 1888. Ralph L. Goodrich, clerk.

11 In the Circuit Court of the United States, Eastern District of Arkansas.

HENRY M. RECTOR
vs.
TILLIE LIPSCOMB.

John D. Ware, first being duly sworn, states that he is a real-estate agent and broker in the city of Hot Springs, Arkansas, and has been for 2 years last past; that he is acquainted with the value of the property in dispute in the above-entitled cause, and that the lot is of the value of $2,000 and the improvements of the value of $1,000.

JOHN D. WARE.

Sworn to and subscribed before me this 9th day of March, 1888.
[L. S.] WM. HUNT,
Notary Public.

[Endorsed:] Filed March 14, 1888. Ralph L. Goodrich, clerk.

12 In the Circuit Court of the United States, Eastern District of Arkansas.

HENRY M. RECTOR
vs.
TILLIE LIPSCOMB.

E. Burgauer, first being duly sworn, states that he is well acquainted with the property in dispute in the above-entitled cause, and states that said lot is of the value of $2,000 and the improvements of the value of $500.

E. BURGAUER.

Sworn to and subscribed before me this 10 day of March, 1888.
[L. S.] JOHN D. WARE,
Notary Public.

Endorsed: Filed March 14, 1888. Ralph L. Goodrich, clerk.

13 In the Circuit Court of the United States, Eastern District of Arkansas.

HENRY M. RECTOR
vs.
TILLIE LIPSCOMB.

William P. Blake, first being duly sworn, states that he is well

acquainted with the property in dispute in the above-entitled cause, and states that said lot is of the value of $1,500 and the improvements of the value of $1,000.

WM. P. BLAKE.

Sworn to and subscribed before me this 9 day of March, 1888.
[L. S.] JOHN D. WARE,
Notary Public.

Endorsed: Filed March 14, 1888. Ralph L. Goodrich, clerk.

14 In the Circuit Court of the United States, Eastern District of Arkansas.

HENRY M. RECTOR
vs.
TILLIE LIPSCOMB.

O. F. Smith, first being duly sworn, states that he is well acquainted with the property in dispute in the above-entitled cause, and states that said lot is of the value of $1,000 and the improvements of the value of $1,000.

O. F. SMITH.

Sworn to and subscribed before me this 9 day of March, 1888.
[L. S.] JOHN D. WARE,
Notary Public.

Endorsed: Filed March 14, 1888. Ralph L. Goodrich, clerk.

15 In the Circuit Court of the United States, Eastern District of Arkansas.

HENRY M. RECTOR
vs.
TILLIE LIPSCOMB.

I J. D. Kimball, first being duly sworn, states that he is well acquainted with the property in dispute in the above-entitled cause, and states that said lot is of the value of $1,250 and the improvements of the value of $750; total value, two thousand dollars.

J. D. KIMBALL.

Sworn to and subscribed before me this 10th day of March, 1888.
[L. S.] JOHN D. WARE,
Notary Public.

Endorsed: Filed March 14, 1888. Ralph L. Goodrich, clerk.

16 In the Circuit Court of the United States, Eastern District of Arkansas.

HENRY M. RECTOR
vs.
TILLIE LIPSCOMB.

Ed. H. Johnson, first being duly sworn, states that he is well ac-

quainted with the property in dispute in the above-entitled cause, and states that said lot is of the value of $800 and the improvements of the value of $1,100.

ED. H. JOHNSON.

Sworn to and subscribed before me this 10th day of March, 1888.
[L. S.] JOHN D. WARE,
Notary Public.

Endorsed: Filed March 14, 1888. Ralph L. Goodrich, clerk.

17 In the Circuit Court of the United States, Eastern District of Arkansas.

HENRY M. RECTOR
vs.
TILLIE LIPSCOMB.

P. D. Martin, first being duly sworn, states that he is well acquainted with the property in dispute in the above-entitled cause, and states that said lot is of the value of $1,500 and the improvements of the value of $1,000.

P. D. MARTIN.

Sworn to and subscribed before me this 10th day of March, 1888.
[L. S.] JOHN D. WARE,
Notary Public.

Endorsed: Filed March 14, 1888. Ralph L. Goodrich, clerk.

18 In the Circuit Court of the United States, Eastern District of Arkansas.

HENRY M. RECTOR
vs.
TILLIE LIPSCOMB.

W. H. Moyston, first being duly sworn, states that he is well acquainted with the property in dispute in the above-entitled cause, and states that said lot is about of the value of $1,250.00 and the improvements of the value of $1,000; total value, twenty-two hundred & fifty dollars.

W. H. MOYSTON.

Sworn to and subscribed to before me this 9th day of March, 1888.
[L. S.] JOHN D. WARE,
Notary Public.

19 In the Circuit Court of the United States, Eastern District of Arkansas.

HENRY M. RECTOR
vs.
TILLIE LIPSCOMB.

George M. French, first being duly sworn, states that he is well

acquainted with the property in dispute in the above-entitled cause, and states that said lot is of the value of $2,000.00 and the improvements of the value of $900.

GEO. M. FRENCH.

Sworn to and subscribed to before me this 10th day of March, 1888.

[L. S.] JOHN D. WARE,
Notary Public.

Endorsed: Filed March 14, 1888. Ralph L. Goodrich, clerk.

20 In the Circuit Court of the United States, Eastern District of Arkansas.

HENRY M. RECTOR
vs.
TILLIE LIPSCOMB.

D. C. Rugg, first being duly sworn, states that he is well acquainted with the property in dispute in the above-entitled cause, and states that said lot is of the value of $1,250.00 and the improvements of the value of $1,000.00.

D. C. RUGG.

Sworn to and subscribed to before me this 10th day of March, 1888.

[L. S.] JOHN D. WARE,
Notary Public.

Endorsed: Filed March 14, 1888. Ralph L. Goodrich, clerk.

21 In the Circuit Court of the United States, Eastern District of Arkansas.

HENRY M. RECTOR
vs.
TILLIE LIPSCOMB.

C. N. Rix, first being duly sworn, states that he is well acquainted with the property in dispute in the above-entitled cause, and states that said lot is of the value of $2,000.00 and the improvements of the value of $900.00; total, twenty-nine hundred dollars.

CHAS. N. RIX.

Sworn to and subscribed before me this 9th day of March, 1888.

[L. S.] JOHN D. WARE,
Notary Public.

Endorsed: Filed March 14th, 1888. Ralph L. Goodrich, clerk.

22 In the Circuit Court of the United States, Eastern District of Arkansas.

HENRY M. RECTOR
vs.
TILLIE LIPSCOMB.

M. C. O'Bryan, first being duly sworn, states that he is well acquainted with the property in dispute in the above-entitled cause, and states that said lot is of the value of $1,000.00 and the improvements of the value of $1,000.00.

M. C. O'BRYAN.

Sworn to and subscribed before me this 10th day of March, 1888.
[L. S.] JOHN D. WARE,
Notary Public.

Endorsed: Filed March 14th, 1888. Ralph L. Goodrich, clerk.

23 In the Circuit Court of the United States, Eastern District of Arkansas.

HENRY M. RECTOR
vs.
TILLIE LIPSCOMB.

Charles W. Field, first being duly sworn, states that he is well acquainted with the property in dispute in the above-entitled cause, and states that said lot is of the value of $2,000 and the improvements of the value of $1,000; total, three thousand ($3,000) dollars.

CHARLES W. FIELD.

Sworn to and subscribed before me this 10th day of March, 1888.
[L. S.] JOHN D. WARE,
Notary Public.

Endorsed: Filed March 14th, 1888. Ralph L. Goodrich, clerk.

24 UNITED STATES OF AMERICA,
Western Division of the Eastern District of Arkansas.

Be it remembered that at a circuit court of the United States of America in and for the western division of the eastern district of Arkansas, begun and holden on Monday, the twenty-fourth day of October, anno Domini one thousand eight hundred and eighty-seven, at the United States court-room, in the city of Little Rock, Arkansas, the Honorable Henry C. Caldwell, judge, presiding and holding said court, the following proceedings were had, to wit, on March 16th, 1888:

HENRY M. RECTOR
vs.
TILLIE LIPSCOMB. } 620.

On this day comes the plaintiff, by U. M. and G. B. Rose, Esqs., his solicitors, and the defendant, Tillie Lipscomb, by John McClure,

her solicitor, and the motion of the defendant to set aside the order of the court allowing an appeal from the decree in this cause to the Supreme Court of the United States came on for consideration, and it appearing that said order of appeal was improvidently granted without inquiry into the value of the property involved in this suit, and the defendant having filed the affidavits of sixteen persons having knowledge of the value of said property that its value is much less than five thousand dollars:

It is therefore ordered, considered, and adjudged that said order allowing an appeal in this cause be set aside and vacated and stand for naught. Plaintiff has leave to renew his prayer for an appeal and file affidavits as to the value of said property as he may be advised.

25 UNITED STATES OF AMERICA,
Western Division of the Eastern District of Arkansas.

Be it remembered that at a circuit court of the United States of America in and for the western division of the eastern district of Arkansas, begun and holden on Monday, the twenty-fifth day of October, anno Domini one thousand eight hundred and eighty, at the United States court-room, in the city of Little Rock, Arkansas, the Honorable Henry C. Caldwell, district judge, presiding and holding said court, the following proceedings were had, to wit:

On December 16th, 1880:

HENRY M. RECTOR *vs.* ELIHU B. SMITH, & } 399.

HENRY M. RECTOR *vs.* J. W. PARKER *et al.*, & } 400.

HENRY M. RECTOR *vs.* WEST, STEELE *et al.*, & } 401.

HENRY M. RECTOR *vs.* E. Q. GIBBON *et al.*, & } 402.

HENRY M. RECTOR *vs.* MATILDA LIPSCOMB, & } 403.

HENRY M. RECTOR *vs.* HENRY P. SMITH, & } 404.

HENRY M. RECTOR *vs.* THAD. TAYLOR *et al.*, & } 405.

HENRY M. RECTOR *vs.* T. W. BEATTIE *et al.*, & } 406.

HENRY M. RECTOR *vs.* HENRY P. SMITH *et al.* } 407.

It is ordered that the above-entitled causes stand and abide
26 by the following stipulation and agreement, which is hereby entered at large upon the record as follows:

"It is hereby stipulated and agreed that the answer shall be withdrawn in the case of Henry M. Rector *vs.* E. Q. Gibbon *et al.* and a demurrer shall be interposed raising the question of the sufficiency of the bill upon the ground of jurisdiction and to the finality of the decision of the Hot Springs commissioners, which shall be

argued at the next April term with like effect as though filed and argued on the proper rule day, and affidavit and certificate to the demurrer is waived; and it is further agreed that the cases of Rector *v.* West, Steele *et al.*, Rector *v.* Henry P. Smith *et al.*, and Rector *v.* Henry Smith, Rector *v.* Lipscomb, Rector *v.* J. W. Parker *et al.*, Rector *v.* Elihu Smith, and Rector *v.* T. W. Beattie, and Rector *v.* Thad. Taylor, and other cases pending in this court involving the same question shall wait and abide the decision on the said demurrer; and if said demurrer is sustained the same entry shall be made in each of said causes, and demurrer to be formally entered after such decision; and if said demurrer shall be overruled the parties shall have time to take depositions with like effect as though their answers had been filed and depositions taken under regular rules.

(Signed) SAM. W. WILLIAMS,
For Defendants in Above Causes.
F. W. COMPTON,
U. M. ROSE,
For Complainants.

27 UNITED STATES OF AMERICA, }
Western Division of the Eastern District of Arkansas. }

I, Ralph L. Goodrich, clerk of the circuit court of the United States for the western division of the eastern district of Arkansas, in the eighth circuit, hereby certify that the foregoing writings annexed to this certificate are true, correct, and compared copies of the original remaining of record in my office and constitute the record of the Hot Springs Commission on the claim of Matilda Lipscomb, her motion to disallow the appeal herein, with supporting affidavits, the order of court vacating the allowance of appeal, and agreement of counsel in reference to finality of Hot Springs Commission decisions, &c.

The Seal of the Circuit Court, Western Division of East. Dist., Ark., U. S. A.

In witness whereof I have hereunto set my hand and the seal of said court this 13th day of April, in the year of our Lord one thousand eight hundred and ninety-one, and of the Independence of the United States of America the one hundred and fifteenth.

Attest: RALPH L. GOODRICH, *Clerk*,
By W. P. FIELD, *D. C.*

Endorsed on cover: Sup. Court U. S. October term, 1890. No. 341. Henry M. Rector, app'lt, *vs.* Matilda Lipscomb. Stipulation & addition to record. Filed April 17, 1891.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1891.

HENRY M. RECTOR, *Appellant*,
vs.
MATILDA LIPSCOMB.
No. 40.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

BRIEF FOR APPELLANT.

This is a controversy as to the right to lot ten, in block one hundred and twenty-five, in the town of Hot Springs, Arkansas; the appellant averring and insisting that appellee holds it in equity, as trustee for him, and that she should be decreed to convey the same to him upon his paying her certain sums expended by her in securing the title from the United States; and the appellee takes issue broadly to this, and denies all claim of appellant, and most vigorously asserts her own right to this piece of ground.

At a glance the court will see this record furnishes a case quite similar to *Lawrence* v. *Rector*, *137 U. S., 139; S. C. 111 U. S., 276*; and that the law that governed in that case will, in the main, control this.

In his bill in the court below Rector avers his possession of this piece of ground as part of his New Madrid claim, continuing since 1839—improvements placed upon it by him—his leasing it to Mrs. Lipscomb by written lease, which has been lost and can not be produced—her getting possession of the ground under him, and paying him rent for the same from time to time. (Rec., pt. 1, p. 1, *et seq.*)

Mrs. Lipscomb in her answer (Rec., *sup.* 5, *et seq*), denies substantially these allegations, but fails most clearly to deny that she got possession of the lot under and through Rector, which, at last, is the chief element to be discussed and considered in the case.

On these issues joined, depositions for both parties were taken, to be noticed more at large hereinafter, and, upon the hearing, the court below dismissed the case for want of equity (Rec., *sup.* 10), and Rector filed his affidavit as to the value of the property and prayed an appeal, which was granted on the 9th of February, 1888 (Rec., *sup.* 16).

For error, it is assigned, the court below dismissed the case made by Rector, when it should have granted him a decree as prayed for.

It is possible, if not probable, a preliminary question may be presented in this case as to the want of jurisdiction, on account of the value of the property. When Rector filed in open court his affidavit (9th February, 1888), as to value, and the court accepted it and granted the appeal, that closed the inquiry as to value. It became a question settled in that court which this court will not review. *Red River Cattle Co.* v. *Needham*, *137 U. S., 632, et seq.*, and cases cited. Upon these authorities this court will not venture to inquire into the preponderance of testimony as to value. See especially *Gage* v. *Pumpelly*, *108 U. S., 164.*

This appeal, granted on 9th of February, 1888, was perfected and filed in this court on March 8th, 1888.

On the 16th of that same month (Rec., pt. 2, 10), Mrs. Lipscomb filed in the court below divers and sundry *ex-parte* affidavits of citizens of Hot Springs to show the property was not worth $5,000, and on these moved the court to set aside the order allowing the appeal, as it had been *improvidently* granted, which the court very *improvidently* proceeded to do (Rec., pt. 2, 11). When this order was made there was no case before that court; it had gone from there and was lodged in this court by its being filed March 8th, 1888, just eight days before this setting-aside and annulling order was entered—too late, decidedly so. This court had jurisdiction of this case when this order of the court below was made, and that order was and is absolutely void. *Kayser* v. *Farr*, *105 U. S.*, *265*, and cases cited.

How unnecessary would be the late act of Congress to relieve this court of its heavy burden of work, if such orders as this were of force; and it may be the court below was, in making it, actuated by the very laudable desire to afford relief to this court, or it might have been done under a misconception of the old maxim, "it is the duty of the judge, when requisite, to *amplify* the limits of his jurisdiction."

In any event, here or in the court below, these *ex-parte* affidavits produced by appellee could be of no avail. *137 U. S., sup.*

The case being safely before this court, for its decision upon the merits, what are the facts?

Both parties were before *The Hot Springs Commission*, a tribunal organized by act of Congress with certain jurisdiction and duties—with all of which this court is now most familiar—on petition and testimony claiming title to this lot, as was the case in *Lawrence* v. *Rector*, *sup.*, and the award was made to appellee; and Rector then proceeded, by bill in equity, to establish his claim, as he did in the *Lawrence case*, *sup.* His right thus to proceed is now established beyond all question.

In his deposition (Rec., pt. 1, p. 10, *et seq.*) Rector shows he rented this ground to appellee and took her and showed her where the lines were, in order that there might be no misunderstanding or trouble on that score; that a written lease was made out, but it has been lost and can not be produced. This lays the foundation for the admission of evidence as to its contents, and no authority is needed on this point. Rector is not certain that appellee signed the lease, but his signing it and appellee assenting to its terms, taking possession under it, and paying rent to Rector, make the lease good whether she signed it or not. *Trapnall* v. *Merrick, 21 Ark., p. 503. 1 Woodf. L. and T.* (1 Am. edn.) *2, 52, 213.*

In his deposition Rector further shows, which is most important of all, appellee got possession solely and alone under him, and by his own acts, and that she paid rents to his agent, Stidham, for the use of this ground.

The essential thing in this inquiry is the fact of how was the possession gained by Mrs. Lipscomb—under and by or through whom? This was the great question in the *Lawrence case*, already referred to, and its broad recognition there supersedes the necessity of any argument here. But, it may be added, the reason for the enforcement of the rule as to possession is much stronger in this than in that case, because appellee here was not merely tenant under Rector, but she was actually his servant, in daily employment at his *bath-house*. To thus assert her supposed right against Rector would be a double violation of good faith, as tenant and as employé, which is not only *improvident*, but rude conduct, and is absolutely inequitable.

This leading and distinctive issue as to how the possession was obtained is not squarely met by Mrs. Lipscomb in her answer, as before noticed, and this is sufficient to settle the case for Rector. But this is not all. Mr. Kinkead, who built the house for Mrs. Lips-

comb in "Happy Hollow," literally sustains Rector as to the payment by appellee of rent to Rector's agent (Rec., pt. 1, p. 13). The inquiry then arises, on what account and for what purpose was she paying rent to Rector's agent? There is no other transaction between them on or for which she was indebted to Rector but this, and this is fully explained by Rector in his deposition just referred to.

To this, however, must be added Mrs. Lipscomb's own declaration to Mr. Kinkead, with whom she had been well acquainted for ten or more years before that, "*that she was going to lease the ground from Rector, paying him $5 per month rent*" (Rec., *sup.* 13).

Although, by the record, it appears there was quite ample room and time for repentance, yet it is no where shown that Mrs. Lipscomb ever repented of that declaration, or ever, in any way, retracted it, but quite the contrary, she adhered to it and carried it out.

Turn, then, to the deposition of appellee (Rec., pt. 1, p. 14). She says, merely, she remembers no such statement as that made by Mr. Kinkead as to her declaration of intention to rent from Rector. Of course Mrs. Lipscomb, being a party in interest in this suit, is not exempt from the influence that usually attaches to persons thus situated; but her statement in this respect, at most, is only a denial of recollecting to meet the absolute assertion of fact by Mr. Kinkead, who is not at all interested in the case. *Best, Pr. Ev.* (Am. edn. by Chamberlayne), *280, note n.*

The court, by examining this record (pt. 2, p. 1, *et seq.*), will be informed Mrs. Lipscomb admitted in her petition before *The Hot Springs Commission*, "that she entered upon said above-described premises by *permission of Henry M. Rector* in 1875," and again to the same effect is her testimony (Rec., pt. 2, p. 2,) before that *commission;* and the record in the *Lawrence case*, on the lease to Gib-

bons, shows the lots on either side of lot 10, for some distance, were awarded to Rector on proof made by him; that Mrs. Lipscomb admitted she got the ground from Rector, and it had been cleared and cleaned up by Rector ready for building and was in his possession when she got it (see record in the Lawrence case, No. 56, last term, p. 64, p. 304–6). Rector's deposition in that case (p. 64), with his deposition in this, gives a full history of his claims and possessions in that vicinity. And in the *Lawrence case* (Rec. 551) there is an agreement of parties that depositions taken in it may be used in all the other cases in which Rector is prosecuting claims, subject, of course, to exception for competency, etc., etc.

But further, appellee says in this case she "asked Gov. Rector about building there because he *claimed* the ground inside the fence; I did not know but that he might claim ground outside the fence—some said it was his and some said it was the Government's." (Rec. pt. 1, p. 14).

Here is a plain admission of her intention as stated by Mr. Kinkead, and it matters not for what reason she asked Rector about building there; she asked him and he consented, and in peace she built and enjoyed her possession. It happens, however, she gave the very best reason for asking him—that he *claimed* the ground, and some people asserted it was his. There can be no better reason—it is the supreme reason of all.

We do not ask to buy, rent, or borrow of people we do not regard as owning or claiming the thing we wish to buy, rent, or borrow; and it is true some said it was Rector's, and some said it was the Government's. Indeed, such had been the conversation of people round and about there for years and years before that, and while it was undecided whose it was, and while it was included in the New Madrid claim that Rector had been asserting and prosecuting most earnestly

and assiduously for a long period previous to that time—so long that scarcely a living man was old enough to tell the time he was not pushing it with the utmost energy—and whose possession under which this court in the main *Hot Springs case, 92 U. S., 698,* and in the *111 Ib., 276,* positively recognized, Mrs. Lipscomb might well ask him for leave to build there—not that his title in fee was fixed or established; by no means; but he had a claim to it under color of title, which no one but the Government could dispute or controvert, and as R. had the possession, and the Government was not complaining, he could lease to Mrs. Lipscomb or any one else. The error in Mrs. Lipscomb's demeanor was the same as that exhibited in the *Lawrence-Rector* case. Ballentyne got his possession under Rector and "some people said Rector owned the ground and some said it was the Government's," just as we see here. And the lessee thought he could repudiate his landlord, who gave him possession and tried it, but in vain. Wiser people than Mrs. L., or people having more advantages for knowledge than she, have stumbled and fallen on this same rock, and it is not surprising that she too should flounder and be wrecked there. She knew, as everybody in that vicinity knew, that no one could enter upon one foot of what was included in that New Madrid claim against Rector's wishes, without immediate and most active litigation. Knowing this, she bought her peace of Rector, got her possession under him, carried on her work on that ground, built there and prospered, and she is estopped, yes, precluded, in every sense of the word and by every reason of the rule, from denying Rector's right.

The only other deposition for appellee—Anna Crawford's (Rec., pt. 1, p. 15)—discloses nothing material, except that Stidham, who was Rector's agent, kept appellee's money for her—she deposited with him, etc. But this leaves only a possible inference which can not outweigh the positive statements of Rector and Kinkead.

Without entering into a discussion of familiar principles of law and citing authorities to sustain them, it is safe to say the litigation in this court, already several times referred to between Rector and other recalcitrant tenants, determines all the law in this case for Rector and pretty nearly all the facts, too, as we have seen by reference to appellee's petition and her testimony in the record in that controversy, upon which all the other similar cases were, by agreement, suspended, and made, to some extent, to depend. What is new or additional in this record in no wise disturbs the finding in that, but, on the contrary confirms and sustains it, and furnishes, in truth, a stronger case for the application of the doctrine there announced. Because it is idle to talk of Rector's not having possession since 1839 of all the ground that was embraced in the New Madrid claim, and this portion, admitted by Mrs. L. to have been put in her possession by him, should be decreed to him, just exactly as was that involved in the *Lawrence case*, and for a stronger reason as we have seen.

And if this court is not now ready to permit Mrs. L. to defeat her own act, or to deny its validity to the prejudice of another—a privilege the law allows to no one—the case should be reversed.

A. H. Garland,
H. J. May,
For Appellant.

FILED.
NOV
JAMES H
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1891.

RECTOR
vs. No. 40.
LIPSCOMB.

ADDITIONAL BRIEF FOR RECTOR.

We deem it advisable, and therefore crave leave of the court to put in an additional brief for appellant in this case, to present fully our oral response to the suggestion of Mr. Justice Brewer, when the case was before the court on the 20th inst.

That suggestion was to the effect that appellee got, by the award of the commission, a different lot from the one she leased of Rector, and referred to Rector's deposition (Rec., 11, first part) to sustain this.

While the record generally is confused on this point, Rector's deposition alluded to, taken as a whole, explains this, and if it is used in part it must be used in full—in all its parts. As explained by Rector, and as it appears on page 305 of the record in the *Lawrence case*, the plat of appellee, filed with the commission, showing her home to be in one corner of the plat, and falling or situate in the street, she took the chances in attempting to run her claim across the street and over the branch so as to include

lot ten (10)—100 feet front and back, and 140 feet deep. On page 422 of the same (Lawrence) record it will be seen, Rector's plat of his claim before the commission embraced this same lot ten (10), and he was awarded, as before seen, lots 9 and 11, adjoining above and below this lot ten (10), based upon the same original claim of right and of possession as is his demand for lot ten (10) and no other.

Conceding, then, appellee got, by change or alteration of her claim, another and different lot, the question arises at once, how did she happen to do this? Under and by what right was this brought about?

The fact that the ground leased by Rector to appellee was needed for *street* and *hot water* reservation was a sufficient reason for withholding it, by the commission, from appellee and anybody else; but that she could swap this, so to speak, for another piece of land in her own right near by and claimed by Rector is out of all question.

It is clearly and distinctly before the court, that appellee got her foothold from the first, and, therefore, any right at all by lease from Rector. Outside of the testimony of Rector and of Kinhead, it is shown plainly, in our brief heretofore filed (p. 5), that Mrs. Lipscomb admits she got there by Rector's permission, &c. (See, also, p. 14, Rec., first part.) As tenant of Rector, then, she got such a position as enabled her to shift her claim from one piece of ground to another piece claimed and possessed by her landlord, or lessor, of the first piece.

Can she hold this other piece absolutely in her own right in the face of these facts? No more than she could hold the first piece, or the piece leased her by Rector free from his claim. By advantage of her lease from Rector as to one lot, she succeeds in transferring her claim to another claimed by Rector. Her possession of the leased ground under Rector was Rector's possession. The change of her mind or purpose could not work an injury to Rector.

In this transaction she was at last a trustee for Rector, Rector's agent; the trust created in the first instance followed and attached to, and fastened itself on lot ten (10) as firmly and securely as it existed on the leased lot. When the appellee stepped across the street and the branch and planted her claim on lot ten (10), she carried with her in full force and virtue the trust on the leased lot, and planted it on that lot with her shifted or changed claim; and the law will not permit her to get this benefit from Rector, to his loss, however kindly the commission might have felt towards her. The law will not allow appellee and the commission thus freely to trade in property claimed by Rector, after he alone had put appellee in a position to ask for anything whatever. This would give her not only leave to take advantage of her own wrong, but to do indirectly what she could not do directly. How worthless would be all trusts if this is to be allowed! How valueless, and almost practically ridiculous, would be the rule announced in the *Lawrence* case after a long, stubborn, and fierce struggle if this is a lawful and just thing to be done.

The trust estate may change; it may be invested many times over; it may be exchanged and swapped; it may result in many collateral consequences, but the trust still lives, and is enforceable as to the substituted property, or whatever may be the collateral result, all based upon cardinal principles that are elementary in the books and are of daily application:

Adams Eq. (7 Am. Ed.), 143 note (t)';
1 Sto. Eq. Jur. (13 Ed.), 64 G and notes; 2 *Ib.*, 1258–65;
May *v.* LeClaire, 11 Wall., 217 *et seq*;
Olds *v.* Cummings, 31 Ill., 188.

The question is viewed and considered in all shapes and varieties in Dyer *v.* Dyer, 1 W. & T. l'd'g cas., Eq., pt. 1, p. 203, and English and American cases there cited.

Suppose appellee, after the commission signified they would take the leased ground for *street* and *hot water* reservation, had, instead of asking for lot ten (10) asked for ground included within what we all know existed at Hot Springs, either the Hale or Gaines possessions under their claims! Of course the commission would not have allowed this. Why? Because she was not tenant of either Hale or Gaines, but her right to be before that tribunal at all was as Rector's tenant—only the privity between her and Rector gave her a standing anywhere, and when she went after lot ten (10) her tenancy under Rector, her privity with him, went with her, and followed the original trust as certainly as the shadow follows the substance. She could not get one piece of ground belonging to Rector, barring the right of the Government to take it, but she got another of Rector's lots, and when she did this, she got it in law, with the same burden that would have attached to the first or leased piece, had it been purchasable. There is no escape from the proposition.

This is one of those cases which happily illustrates the remark so frequently met with in the books that "equity looks through the form to the substance of things."

And we repeat, as the original consideration at the bottom of Mr. Lipscomb's claim came from and through Rector, the principle of law governing the *Lawrence* case is as directly applicable here as there, and the mere shifting of her claim from one of Rector's lots to another does not avoid the application of that safe and true doctrine. And this appears to be so plain we did not consider it worth while, in our original brief, to discuss the law as to changing the subject-matter of the trust.

We respectfully ask this may be received and considered with our original brief herein.

A. H. GARLAND,
H. J. MAY,
Attorneys for Appellant.

October 26, 1891.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1891.

RECTOR
vs. No. 40.
LIPSCOMB.

ADDITIONAL BRIEF FOR RECTOR.

We deem it advisable, and therefore crave leave of the court to put in an additional brief for appellant in this case, to present fully our oral response to the suggestion of Mr. Justice Brewer, when the case was before the court on the 20th inst.

That suggestion was to the effect that appellee got, by the award of the commission, a different lot from the one she leased of Rector, and referred to Rector's deposition (Rec., 11, first part) to sustain this.

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lot ten (10)—100 feet front and back, and 140 feet deep. On page 422 of the same (Lawrence) record it will be seen, Rector's plat of his claim before the commission embraced this same lot ten (10), and he was awarded, as before seen, lots 9 and 11, adjoining above and below this lot ten (10), based upon the same original claim of right and of possession as is his demand for lot ten (10) and no other.

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Can she hold this other piece absolutely in her own right in the face of these facts? No more than she could hold the first piece, or the piece leased her by Rector free from his claim. By advantage of her lease from Rector as to one lot, she succeeds in transferring her claim to another claimed by Rector. Her possession of the leased ground under Rector was Rector's possession. The change of her mind or purpose could not work an injury to Rector.

In this transaction she was at last a trustee for Rector, Rector's agent; the trust created in the first instance followed and attached to, and fastened itself on lot ten (10) as firmly and securely as it existed on the leased lot. When the appellee stepped across the street and the branch and planted her claim on lot ten (10), she carried with her in full force and virtue the trust on the leased lot, and planted it on that lot with her shifted or changed claim; and the law will not permit her to get this benefit from Rector, to his loss, however kindly the commission might have felt towards her. The law will not allow appellee and the commission thus freely to trade in property claimed by Rector, after he alone had put appellee in a position to ask for anything whatever. This would give her not only leave to take advantage of her own wrong, but to do indirectly what she could not do directly. How worthless would be all trusts if this is to be allowed! How valueless, and almost practically ridiculous, would be the rule announced in the *Lawrence* case after a long, stubborn, and fierce struggle if this is a lawful and just thing to be done.

The trust estate may change; it may be invested many times over; it may be exchanged and swapped; it may result in many collateral consequences, but the trust still lives, and is enforceable as to the substituted property, or whatever may be the collateral result, all based upon cardinal principles that are elementary in the books and are of daily application:

Adams Eq. (7 Am. Ed.), 143 note (t)';
1 Sto. Eq. Jur. (13 Ed.), 64 G and notes; 2 *Ib.*, 1258–65;
May *v.* LeClaire, 11 Wall., 217 *et seq*;
Olds *v.* Cummings, 31 Ill., 188.

The question is viewed and considered in all shapes and varieties in Dyer *v.* Dyer, 1 W. & T. l'd'g case, Eq., pt. 1, p. 203, and English and American cases there cited.

Suppose appellee, after the commission signified they would take the leased ground for *street* and *hot water* reservation, had, instead of asking for lot ten (10) asked for ground included within what we all know existed at Hot Springs, either the Hale or Gaines possessions under their claims! Of course the commission would not have allowed this. Why? Because she was not tenant of either Hale or Gaines, but her right to be before that tribunal at all was as Rector's tenant—only the privity between her and Rector gave her a standing anywhere, and when she went after lot ten (10) her tenancy under Rector, her privity with him, went with her, and followed the original trust as certainly as the shadow follows the substance. She could not get one piece of ground belonging to Rector, barring the right of the Government to take it, but she got another of Rector's lots, and when she did this, she got it in law, with the same burden that would have attached to the first or leased piece, had it been purchasable. There is no escape from the proposition.

This is one of those cases which happily illustrates the remark so frequently met with in the books that "equity looks through the form to the substance of things."

And we repeat, as the original consideration at the bottom of Mr. Lipscomb's claim came from and through Rector, the principle of law governing the *Lawrence* case is as directly applicable here as there, and the mere shifting of her claim from one of Rector's lots to another does not avoid the application of that safe and true doctrine. And this appears to be so plain we did not consider it worth while, in our original brief, to discuss the law as to changing the subject-matter of the trust.

We respectfully ask this may be received and considered with our original brief herein.

A. H. Garland,
H. J. May,
Attorneys for Appellant.

October 26, 1891.

Office Supreme Court, U. S.
FILED,
OCT 30 1891
JAMES H. MCKENNEY,

IN THE

Supreme Court of United States.

OCTOBER TERM, 1891.

HENRY M. RECTOR,
vs. No. 40.
MATILDA LIPSCOMB.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, EASTERN DISTRICT OF ARKANSAS.

BRIEF FOR APPELLEE.

1. THE CASE SHOULD BE DISMISSED.

The decree, in the case at bar, was rendered on the 26th of April, 1886. The pleadings did not show the value of the property in controversy. On the 9th of February, 1888, without notice to the defendant, of an intention to make application for an appeal, the plaintiff filed his own affidavit stating that the property in dispute was of greater value than $5000, and prayed an appeal to this court, from a decree dismissing the plaintiff's suit. The allowance of the appeal was granted on the same day (February 9, 1888), and citation was issued of that date which was served on the defendant on the 13th of February, 1888.

On the 14th of March, 1888, that being a day of the same term of court at which the appeal was granted, the

defendant filed a motion asking the court to set aside the former order granting the appeal on the ground that the same had been erroneously and improvidently made. [Amended Record, p. 4.] In support of the motion the affiadvits of sixteen persons were produced, showing that the property in dispute was worth from $1200 to $2500, and no more.

On the 16th of March, 1888, that being a day of the same term at which the appeal was granted, the court feeling it had been imposed on, as to the matter of value, and that the appeal had been improperly granted, made an order vacating the former order granting the appeal, with leave to the plaintiff to renew his prayer for an appeal and file affidavits as to the value of the property, as he might be advised. [Amended Record, p. 22–3.]

The order is as follows: "On this day comes the plaintiff, by U. M. & G. B. Rose, Esqs., his solicitors and the defendant Tillie Lipscomb, by John McClure her solicitor, and the motion of the defendant, to set aside the order of the court allowing an appeal from the decree in this cause to the Supreme Court of the United States came on for consideration, and it appearing that said order of appeal was improvidently granted, without inquiry into the value of the property involved in this suit, and the defendant having filed the affidavit of sixteen persons having knowledge of the value of said property; that its value is much less than $5000. It is therefore ordered, considered and adjudged that said order allowing an appeal in this cause be set aside and vacated and stand for naught. Plaintiff has leave to renew his prayer for an appeal and file affidavits as to the value of said property as he may be advised."

The plaintiff did not renew his prayer for an appeal, or file any affidavits in relation to the value of the property.

On the 6th of March, 1888, the plaintiff filed in the office of the clerk of this court a partial copy of the record in this cause, omitting therefrom the testimony taken before the Hot Springs Commission.

On the 17th of April, 1891, the residue of the record was filed with the clerk of this court, by agreement of counsel, together with the proceedings of the court vacating the allowance of the appeal.

Our first contention is that there is no appeal pending in this court, and that this fact appears from the record.

The contention of the plaintiff is that the Circuit Court has no control over its records and judgment during the term at which they are rendered.

It appears to me to be a work of supererogation to cite authorities in support of the proposition that all judgments, decrees and other orders made by the court during the term, are under the control of the court pronouncing them.

Justice Miller in *Bronson* v. *Schulten, 104 U. S. 415*, says:

"It is a general rule of law that all judgments, decrees, or other orders of the court, however conclusive in their character, are under the control of the court which pronounces them, during the term at which they are rendered, or entered of record, and they may be set aside, vacated, modified or annulled by that court." *Ex parte Lang, 85 U. S., 163.*

In *Doss et al.* v. *Tyack et al., 14 How. U. S., 312*, the court at the hearing dismissed the bill, but afterward, during the same term, the court set aside the decree dismissing the suit, and Justice Grier, in commenting on the state of facts, said:

"The court, in vacating the decree, were correcting an

error of both fact and law; and during the term at which it was rendered it had full power to amend, correct or vacate it (the decree) for either of these reasons."

In the case of *Goddard* v. *Ordway*, *101 U. S., 752*, this court said:

"Here the question is, whether an appeal was in legal effect allowed. It is true an order of allowance was granted and entered on the minutes of the court. So long as this order continued in operation it bound the parties; but as it remained subject to the judicial power of the court, *during the term at which it was entered*, its revocation vacated what had been done, and left the decree standing with no appeal allowed. Neither one of the parties was finally discharged from the court *until the term ended*, and each was bound to take notice of whatever was done affecting his interest in the suit *until a final adjournment actually took place*."

Counsel for the plaintiff were present when the order granting the appeal was set aside, and made no objection thereto, recognizing the doctrine laid down in the cases cited that the court had the right to vacate the order granting the appeal.

Whether the property in controversy was worth $5000, is a jurisdictional question, not only in the court granting the appeal, but in this court. In *Red River Cattle Co. v. Needham*, *137 U. S., 632*, the court below refused to set the order aside granting the appeal and left the question of value to be determined by the Supreme Court from the affidavits tendered. The difference between that case and this is manifest. In the one at bar, the court below set aside the order, in the other it refused. The question here is, whether a court that has been induced to grant an appeal by virtue of a false affidavit can, at

the same term set it aside, after its falsity has been made to appear? If it can, then there is no appeal before this court.

It is contended that *this* court had jurisdiction of this case when the Circuit Court made the order vacating and setting aside the order granting the appeal, and cases are cited in support of that contention. None of the cases referred to sustain the position. In the case of *Keyser v. Farr, 105 U. S., 266*, there was a *supersedeas* bond, and the question was whether that bond, could be abrogated by the court below, after it had been filed with a transcript of the record *in this court*, and it was held it could not be done. The case turned upon the effect of the *supersedeas* bond and not upon the power of the court over its own records, in cases where no *supersedeas* bond was given.

The other cases alluded to by counsel for the appellant have no bearing on the question they are cited to support.

It is clear the court was imposed upon when it first granted the appeal. It was deceived by an affidavit, which sixteen persons well acquinted with the value of the property in effect say is not true. This is but another name for a fraud, and to say that one may perpetrate a fraud on the court below, and if he is able to file a transcript of the record in this court before it is discovered, that this cuts off all inquiry into the matter by the court below, though the discovery is made before the term elapses. It not only does this, but goes further and denies the right of this court to investigate whether it has jurisdiction. We insist that if the court below did not have the power to set aside the order granting the appeal, during the term at which it was made, that this

court has the power to allow the question to be raised here, where it appears that the order granting the appeal was procured upon a false affidavit, and insist that the parties should have an opportunity to show that the jurisdiction of this court is being imposed upon.

THE CASE UPON ITS MERITS.

The case at bar has none of the characteristics of the *Rector-Ballentine* case. In the last named case, under the terms of the lease, Rector was to have the *improvements* made on the property. In the case at bar there never was a lease of any kind, and the proof is that the improvements were made by the defendant. The plaintiff says [Record, p. 10]: "I drew up an agreement, signed it *myself*, and read it to her (the defendant). I do not recollect whether *she signed it or not.*"

Counsel for appellant argues the case from a false premise. He assumes, that the house which he claims the appellant built, but which defendant denies, and proves she built and paid for, was upon the ground in controversy; whereas, in truth and fact, the land in controversy is not that which the plaintiff pointed out to defendant, and told her she might build upon, and on which the house alluded to by the witness Kincaid (p. 13) was built. The land pointed out by the plaintiff, where he says he gave defendant permission to build, was on the south side of the creek, passing through "Happy Hollow," and now a part of the reservation, and that which was awarded the defendant is on the north. They are separate and distinct tracts. No permission was given defendant to enter on the land awarded her by the Hot Springs Commission. She went upon the land *now* in controversy, in the year 1875, of her own volition, and built a wash-house on it and cleared it up, without per-

mission from the plaintiff, or any one else. That on which she entered, by permission, was taken for a street, and the reservation.

Circuit Judge Brewer (now an associate justice of this court), at the hearing, held that it appeared from the proof made by the plaintiff and defendant, that lot 10, in block No. 125, in the City of Hot Springs, Ark., and which is the property now in dispute in this action, was not the same lot which the plaintiff claimed, before the commission, to have leased to the defendant; but another and different tract.

Gov. Rector, the plaintiff says: "The lot of ground upon which I laid off to build that house (that of the defendant), fronted some thirty or forty feet and ran back some seventy or eighty feet, I think, but Tillie (the defendant), in filing her claim and making out her plat for the land, claimed, not only that which included her house, *but ran across the branch*, and across the street, over on to lot 10 of the present Hot Springs city map, *the house and lot that I rented her being in a different locality altogether. I was not apprised that she filed any application, or made any claim to lot 10 before the commissioners.* Supposing this, I did not examine her application to purchase land, *knowing full well that she could not claim, or acquire title, nor could I, to the house and lot I had leased to her. The lot that was awarded to her by the commissioners embraced* NO PART OF THE LOT I LEASED HER." [Record, p. 11.]

Here we have the admission that the right of the defendant to the lot in controversy, was not contested, by the plaintiff, before the commission, as against the defendant, and that he did not know, when the commission was in session, she set up any claim to it. This being

true the statute bar of six months prescribed by the act appointing the commissioners barred the plaintiff's claim.

The defendant states: "The ground where the house stood was taken by the street; the ground south of the house was taken by the Hot Springs Reservation for the government. I had one shed, made of planks, which is standing there now, put upon the ground laid off as lot 10. I washed in that shed. I had the shed erected in the fall of 1875." [Record, p. 14.]

As to this lot 10, the plaintiff introduced no proof before the commission. The right of the defendant to it was not contested before that body. This I assume, because there is no testimony in the record, which in any manner shows that the plaintiff claimed the lot in controversy by virtue of occupation or improvement, before that tribunal, but on the contrary, an admission he made no proof in relation to it. There was no proof, before the commission, so far as the record shows, that the plaintiff ever made any improvement on lot 10, now in controversy. On the contrary the plaintiff states [Record, p. 11], "In my testimony before the Hot Springs Commission it will be found that I stated that I did not desire the house, insomuch as I would be unable to purchase the land, *it being reserved.*"

Counsel for the plaintiff claims that the land in controversy was *claimed* by the plaintiff before the commission. It is not what one *claims*, but what he *proves*, that fixes his rights. Plaintiff testifies, as has heretofore been stated, that he was of the impression that the lot on which the house was built would constitute a part of the ground reserved to the government, and for that reason he did not make any proof in relation to improvement, and that he did not know the defendant was contending for it, the lot

now in dispute. If the defendant had not made the proof she did, under this state of case, the lot in controversy would have gone to the United States. Under this state of case, there could not have been a mistake of *law*. If a mistake was made by the commission, it was one of *fact*. If a mistake of fact, this court has repeatedly held that they will not review the action of the officers of the land department on matters of disputed facts. If there is but one party who introduced proof of improvement and occupation as to the lot in controversy, and the commission awarded the lot to the person making the proof, there may have been error as between that party and the United States.

It may be that under a fair construction of the act creing the commission this lot ought not to have been awarded to any one. Be that as it may, the commission did award it to the defendant. This is a matter, no matter how erroneous it may have been, that does not enlarge the rights of the plaintiff. So long as the Uuited States does not complain, her title is good against the world.

As to the property now in dispute, the defendant having entered without the consent of the plaintiff, the relation of trustee and *cestui que trust* could not have existed, nor could that of landlord and tenant, for there was no consent to enter upon this particular tract, nor could the commissioners have erred, in a matter of law, in not giving the plaintiff a certificate to property which he failed to introduce proof, as to *improvement* and *occupancy*, before that tribunal.

The decree of the Circuit Court should be affirmed, even if the court should find that this case is properly before it on appeal.

JOHN MCCLURE,
for Appellee.